From *Fortnightly* to *Aereo*: Unauthorized Television Re-Broadcasting and the Public Performance Right

© Lateef Mtima, Professor of Law, Howard University School of Law, Director, Institute for Intellectual Property and Social Justice

Introduction

The introduction of a new technological use for copyrighted works often poses a challenge to the balance of social utilities achieved through the copyright author's incentive/exclusive rights mechanism and the corollary reservation of broad public access to copyrighted material. As the copyright regime dictates, specific uses of copyrighted works are rendered exclusive to the copyright owner, which exclusive property rights may be exploited for commercial gain and as compensation for her expressive labors. At the same time, however, the public is otherwise free to engage in and benefit from all other uses of such works, and thereby maximize their potential to inform, enlighten, and spark further creative and expressive output. Consequently the introduction of a new technological use for copyrighted material often requires that the courts, and ultimately Congress, decide how the allocation of that use, as between the copyright holder and the public, would best comport with the social utility objectives of the copyright law.

Various recent disputes regarding the use of DVR technology to disseminate copyrighted material implicate these important questions of copyright law and policy. Indeed, a review of some of the leading, recent court decisions illustrates that the courts have been divided as to how the copyright author/public allocation mechanism should apply to this new technological use, necessitating that the United States Supreme Court address the issue. In order to assess the range and complexity of the issues confronted by the Court, however, it is necessary to identify and analyze both the pertinent exclusive rights and the key judicial precedents relevant to the Court's ultimate application of copyright law to DVR technology.

The Copyright Exclusive Rights

The copyright law provides a special kind of protection for the works within its ambit. As enumerated in 17 U.S.C. 106, certain specific uses of such works, such as making a copy, are reserved as exclusive to the author of the work; all other uses, however, such as reading a book or singing a song in the privacy of one's home, are freely available to the general public, and individuals can engage in such uses without the copyright holder's permission. The principal exclusive rights implicated by DVR technology are:

The Reproduction Right

The unauthorized reproduction of a copyrighted work constitutes copyright infringement. *See e.g. A&M Records, Inc. v. Napster, Inc.,* 239 F.3d 1004, 1013 (9th Cir. 2001); *see also NCR Corporation, v. The ATM Exchange, Inc.*, 2006 U.S. Dist. LEXIS 30296, *10-*13 (S.D. Ohio) (unauthorized "intermediate copying" or transitory copying can provide the basis for both direct and contributory copyright infringement claims); *FM Industries, Inc. v. Citicorp Credit Services, Inc*., 2007 WL 4335264 (N.D. Ill.)

The Distribution Right

The author of a copyrighted work also enjoys the exclusive right to distribute her work, which includes distribution by sale, lending, or gift. *See e.g. Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1357 (2013).

The Public Performance Right

Finally, the Copyright Act also confers on authors a right of public performance, which provides that "the owner of copyright . . . has the exclusive right . . . in the case of . . . motion pictures and other audiovisual works, to perform the copyrighted work publicly." *See e.g. Nat'l Cable Television Ass'n,Inc. v. Broad. Music, Inc.,* 772 F. Supp. 614, 650-51 (D.D.C. 1991).

The Action for Copyright Infringement

Pursuant to 17 U.S.C. 106 and 501, the author of a copyrighted work is entitled to preclude and/or recover for any unauthorized engagement in her exclusive rights. *See e.g. Meridian Project Systems, Inc. v. Hardin Construction Company, LLC*, 426 F. Supp. 2d 1101, 1107-09 (E.D. Cal 2006); *I-Sytems, Inc. v. Softwares, Inc.,* 2004 WL742082 at *7 (D. Minn.); *Avtec Systems, Inc. v. Peiffer,* 21 F.3d 568, 571 (4th Cir. 1994); *Ford Motor Co. v. Summit Motor Products, Inc.,* 930 F.2d 277, 291 (3d Cir. 1991). The copyright holder can recover compensatory or statutory damages upon establishing a case of infringement. Injunctive relief may also be obtained to prevent further incursions upon the copyright holder's rights. "A preliminary injunction enjoining a copyright infringement serves the public interest by furthering the goals of individual effort and fair competition.... Although… it is in the public interest to encourage the competition and the development of new [works], it is not in the public interest to permit the marketing of a [work] that infringes on the intellectual property rights of another." *Control Data Systems, Inc. v. Infoware,* 903 F. Supp. 1316, 1325 (D. Minn. 1995).

The Fair Use Doctrine: 17 U.S.C. 107

All copyrighted works (and all of the exclusive rights) are subject to the Fair Use Doctrine, "an equitable doctrine [that] permits other people to use copyrighted material without the owner's consent in a reasonable manner for certain purposes." *See Rogers v. Koons,* 960 F.2d 301, 308 (2d Cir. 1992). The doctrine reflects Congress' belief that there are some circumstances in which the benefit to society in permitting the unauthorized use of a particular copyrighted work outweighs the author's interest in being able to control or profit from the use of her work.

Accordingly, the Fair Use Doctrine permits unauthorized engagement in any of the exclusive rights. Section 107 sets out four factors in evaluating whether a particular use should be allowed as a Fair Use: (i) the purpose and the character of the use, such as whether it is primarily commercial in nature or, if it is a transformative use, that is, a use that substantively enhances, builds upon, or re-purposes the work; (ii) the nature of the work involved, that is, whether it is primarily a creative work such as a fiction novel, or a factual work, such as a biography; (iii) the amount and substantiality of the work to be used without the author's permission; and (iv) the effect that allowing the unauthorized use is likely to have upon the market for the work. *See e.g.*

Evolution, Inc., v. Suntrust Bank, 342 F. Supp. 2D 943, 956 (D. Kan. 2004) (holding that unauthorized copying undertaken in order to extract unprotected material constitutes a Fair Use); *but cf. Wall Data Incorporated v. Los Angeles County Sherriff's Department*, *supra,* 447 F. 3d at 777-81 (holding that the unauthorized duplication of licensed software to avoid the purchase of additional licenses is not a Fair Use.)

DVR Technology: Allocating the New Technological Use for Copyrighted Broadcasts

DVR technology enables the reproduction, transmission, and viewing of broadcast programs at the option of the viewer. In assessing whether unauthorized DVR use of copyrighted material results in actionable infringement, however, there are certain key precedents that are essential to understanding the courts' prevailing approach to determining when such use constitutes engagement in one or more of the exclusive rights (and when it does not).

The Cable Broadcast Cases: Fortnightly and Teleprompter[1]

In the early efforts to exploit cable television technology, cable network entrepreneurs often erected broadcast-receiving antennae in or near remote regions, where residents were unable to receive network television broadcasts using only conventional television sets. These antennae were erected for the purpose of capturing network broadcasts being transmitted through the air, which were then re-transmitted via cable to area residents for a fee. In response to this unauthorized use of their copyrighted broadcasts, the holders of the copyrights in these televised programs instigated copyright infringement litigation, asserting that cable re-transmission constituted an unauthorized engagement in at least one of their exclusive rights, specifically, the exclusive right to perform their works publicly.

Although such cable re-transmission at least *simulated* the public performance right, the Supreme Court refused to evaluate the new use solely from this perspective. Instead, emphasizing the fact that cable re-transmission exhibited both exclusive right and public free access characteristics, the Court evaluated it as a *sui generis* activity. The Court ultimately held that cable re-transmission is closer in character to uses relegated to the public than it is to the exclusive right of public performance:

> [Television b]roadcasters perform. Viewers do not perform. Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer; the other, as passive beneficiary….When [cable re-transmission] is considered in this framework, we conclude that it falls on the viewer's side of the line. Essentially, a [cable re-transmission] system no more than enhances the viewer's capacity to receive the broadcaster's signals....If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set....The only difference in the case of [cable re-transmission] is that the antenna system is erected and owned not by its users but by an entrepreneur.

[1] *See Fortnightly Corp. v. United Artists Television, Inc.,* 392 U.S. 390 (1968) and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.* 415 U.S. 394 (1974).

Fortnightly, 392 U.S. at 398-400; *see also Teleprompter,* 415 U.S. at 408.

Although Congress would eventually overrule the Supreme Court and effectively designate cable re-transmission an exclusive right,[2] it did so in a manner that lent credence to the Supreme Court's reluctance to approach cable re-transmission as no more than a simulation or combination of certain pre-existing exclusive rights. On one of the few occasions in the history of American copyright law, Congress imposed a compulsory license in connection with its designation of cable re-transmission as an exclusive right. This meant that although Congress granted television network copyright holders the right to *profit* from the new use of cable re-transmission, it did not grant them the right to *control* it. Instead, Congress determined that given the nature of cable re-transmission, when considered in light of the underlying objectives of the copyright law, the public should be guaranteed the ability to engage in and enjoy this new use for copyrighted material.

The VCR Case: Sony Betamax[3]

In 1984 the Supreme Court was once again called upon to determine the proper copyright allocation of a new technological use for television broadcasts, that of home taping and playback of broadcasts through the use of video‑cassette recorders (VCRs). In *Sony*, members of the motion picture industry sought to bar VCRs from the marketplace, on the grounds that these devices could be used to make unauthorized copies of copyrighted television programs, and therefore VCR users were engaging in direct copyright infringement and VCR manufacturers and vendors were correspondingly liable as contributory infringers. In response, VCR purveyors and users argued, among other things, that copying television broadcasts for later viewing, referred to as "time shifting", is a Fair Use.

The posture of *Sony* was somewhat atypical as a Fair Use case, in as much as VCR users, the putative direct infringers, were not plaintiffs' primary targets, but rather, plaintiffs' objective was to obtain a ban on (or more likely control the market for) VCRs by imposing contributory liability on the purveyors of VCR technology. In a typical Fair Use dispute, a finding that the

[2]*See 17 U.S.C. 111;* See U.S. Copyright Office, A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals i, iv (1997) ("A compulsory license is a statutory copyright licensing scheme whereby copyright owners are required to license their works to users at a government-fixed price and under government-set terms and conditions... . Compulsory licenses are an exception to the copyright principle of exclusive ownership for authors of creative works, and, historically, the Copyright Office has only supported the creation of compulsory licenses when warranted by special circumstances. With respect to the cable and satellite compulsory licenses, those special circumstances were initially seen as the difficulty and expense of clearing all rights on a broadcast signal."), available at http://www.copyright.gov/reports/ (last visited Jan. 14, 2014). *See also* Baoding Hsieh Fan, When Channel Surfers Flip to the Web: Copyright Liability for Internet Broadcasting, *52 Fed. Comm. L.J. 619, 629-30 (2000)* ("In response to two Supreme Court decisions that had held that cable retransmission of broadcast signals did not constitute copyright infringement under the 1909 Copyright Act, Congress amended the Copyright Act in 1976 to specify that retransmissions of broadcast signals - either local or distant, network or independent - are public performances and, therefore, fall within the exclusive rights granted by copyright protection. Section 111 subjects secondary transmissions by cable systems to copyright liability by means of a compulsory license and payment of statutory license fees for certain retransmissions. Later, in order to facilitate the home satellite dish business, Congress passed the Satellite Home Viewer Act of 1988, which created the satellite carrier compulsory license." (footnotes omitted)).

[3] *Sony Corp. of Am. v. Universal City Studios, Inc.,* 464 U.S. 417, 429 (1984).

unauthorized use qualifies as a Fair Use protects only the parties and conduct before the court; while subsequent unauthorized users can surely invoke the prior ruling as precedent, given the highly fact-sensitive nature of Fair Use findings, Fair Use precedent can be of limited value. However, in *Sony*, instead of being asked to assess a particular instance of unauthorized activity, the Supreme Court was effectively asked to categorize an activity, time shifting, as either an author's exclusive right or as a Fair Use.

In finding for the defendants, the *Sony* Court carved out a type of conduct, private time-shifting, as categorically protected by the Fair Use Doctrine. Moreover, in this respect, the decision to permit unauthorized time shifting is somewhat analogous to the imposition a compulsory license by Congress, insofar an entire category of conduct (as opposed to merely a particular individual use) is evaluated from the perspective of the importance of the pertinent new technological use to the social utility objectives of the copyright law.

Assessing DVR Technology: Cartoon Network v. CSC Holdings, Inc. (*Cablevision)*[4]

In *Cablevision* the Court of Appeals for the Second Circuit was tasked with applying the copyright use allocation mechanism to DVR technology, in this case the RS-DVR, which combines the functions of cable re-transmission and VCR record and playback.[5]

> As designed, the RS-DVR allows Cablevision customers who do not have a standalone DVR to record cable programming on central hard drives housed and maintained by Cablevision at a "remote" location. RS-DVR customers may then receive playback of those programs through their home television sets, using only a remote control and a standard cable box equipped with the RS-DVR software…. [Plaintiffs] alleged that Cablevision's proposed operation of the RS-DVR would directly infringe their exclusive rights to both reproduce and publicly perform their copyrighted works. Critically for our analysis here, plaintiffs alleged theories only of direct infringement, not contributory infringement, and defendants waived any defense based on fair use.

536 F.3d at 124. Apparently wary of the principles enunciated in *Fortnightly/Teleprompter* and *Sony*, plaintiffs sought to divert the judicial focus away from the role of the individual customer in the use of the RS-DVR service. Nonetheless, the court dissected each step in the RS-DVR service both in terms of its technical functions and also from the customer's perspective of the service.

> Under the new RS-DVR, this single stream of [broadcast] data is split into two streams. The first is routed immediately to customers as before. The second stream flows into a device called the Broadband Media Router ("BMR") which buffers the data stream, reformats it, and sends it to the "Arroyo Server," which consists, in relevant part, of two data buffers and a number of high-capacity hard

[4] *Cartoon Network LP, LLLP v. CSC Holdings, Inc*., 536 F.3d 121 (2d. Cir 2008).

[5] "[A]s this case demonstrates, the generic term 'DVR' actually refers to a growing number of different devices and systems." 536 F.3d at 123.

> disks. The entire stream of data moves to the first buffer (the "primary ingest buffer"), at which point the server automatically inquires as to whether any customers want to record any of that programming. If a customer has requested a particular program, the data for that program move from the primary buffer into a secondary buffer, and then onto a portion of one of the hard disks allocated to that customer. As new data flow into the primary buffer, they overwrite a corresponding quantity of data already on the buffer. The primary ingest buffer holds no more than 0.1 seconds of each channel's programming at any moment. Thus, every tenth of a second, the data residing on this buffer are automatically erased and replaced. The data buffer in the BMR holds no more than 1.2 seconds of programming at any time. While buffering occurs at other points in the operation of the RS-DVR, only the BMR buffer and the primary ingest buffer are utilized absent any request from an individual subscriber….To begin playback, the customer selects the show from an on-screen list of previously recorded programs. The principal difference in operation is that, instead of sending signals from the remote to an on-set box, the viewer sends signals from the remote, through the cable, to the Arroyo Server at Cablevision's central facility.

536 F.3d at 124-25.

With regard to the broadcast data sent to the BMR and temporarily permitted to reside on the primary ingest buffer, the court held that the BMR does not make actionable "copies" of that data because the data exists/resides for less than a tenth of a second. Accordingly, such reproduction is only transitory, and under the Copyright Act, a transitory reproduction does not qualify as a "copy". 536 F.3d at 127-30.

With regard to the playback copy of the broadcast data, the court concluded that because each copy is made at the direction of an individual customer, and that said copy can only be viewed by that customer, *it is the customer and not Cablevision* that copies and/or "performs" the work. In the court's view, Cablevision merely provides access to a device and thereafter it is the customer (and only the customer) who engages in any volitional exclusive rights conduct (i.e., deciding what to record, when to play it back, etc.) For the court, this made the RS-DVR customer legally indistinguishable from users of VCRs:

> In the case of a VCR, it seems clear-and we know of no case holding otherwise-that the operator of the VCR, the person who actually presses the button to make the recording, supplies the necessary element of volition, not the person who manufactures, maintains, or, if distinct from the operator, owns the machine. We do not believe that an RS-DVR customer is sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party for copies that are made automatically upon that customer's command.

536 F.3d at 131.[6] Moreover, with respect to the customer's performance of the work, the court concluded that said performance not a public performance, because only the customer (and not the public) is "capable of receiving the performance":

> [I]t is evident that the transmit clause directs us to examine who precisely is 'capable of receiving' a particular transmission of a performance. Cablevision argues that, because each RS-DVR transmission is made using a single unique copy of a work, made by an individual subscriber, *one that can be decoded exclusively by that subscriber's cable box, only one subscriber is capable of receiving any given RS-DVR transmission.* This argument accords with the language of the transmit clause, which… directs us to consider the potential audience of a given transmission.

536 F.3d at 134-35 (*emphasis added*).

Extending the Cablevision Rationale: WNET vs. Aereo[7]

In *Aereo*, the Second Circuit was again presented with the problem of the unauthorized use of copyrighted material via a remote access DVR service, albeit one that utilized a different technological configuration than that at issue in *Cablevision*.

> The details of Aereo's system are best explained from two perspectives. From its subscribers' perspective, Aereo functions much like a television with a remote Digital Video Recorder ('DVR') and Slingbox. Behind the scenes, Aereo's system uses antennas and a remote hard drive to create individual copies of the programs Aereo users wish to watch while they are being broadcast or at a later time. These copies are used to transmit the programs to the Aereo subscriber."…."Aereo's system thus provides the functionality of three devices: a standard TV antenna, a DVR, and a Slingbox-like device. These devices allow one to watch live television with the antenna; pause and record live television and watch recorded programing using the DVR; and use the Slingbox to watch both live and recorded programs on internet-connected mobile devices.

712 F.3d at 681-82. Once again, the court evaluated defendant's DVR service from the perspective of service user.

> Three technical details of Aereo's system merit further elaboration. First, Aereo assigns an individual antenna to each user. No two users share the same antenna at the same time, even if they are watching or recording the same program. Second, the signal received by each antenna is used to create an individual copy

[6]The court further indicated that plaintiff's claims seemed more properly grounded in theories of contributory liability. "Most of the facts found dispositive by the district court-e.g., Cablevision's 'continuing relationship' with its RS-DVR customers, its control over recordable content, and the 'instrumental[ity]' of copying to the RS-DVR system…seem to us more relevant to the question of contributory liability." 536 F.3d at 132. As noted above, however, plaintiff had not asserted any such claims.

[7] *WNET v. Aereo, Inc.*, 712 F.3d 676 (2d. Cir. 2013).

> of the program in the user's personal directory. Even when two users are watching or recording the same program, a separate copy of the program is created for each. Finally, when a user watches a program, whether nearly live or previously recorded, he sees his individual copy on his TV, computer, or mobile-device screen. Each copy of a program is only accessible to the user who requested that the copy be made, whether that copy is used to watch the program nearly live or hours after it has finished airing; no other Aereo user can ever view that particular copy.

712 F.3d at 682-83. Given the court's user-centered analysis of the Aereo service, it inexorably concluded that in accordance with *Cablevision* (and *Fortnightly* and *Teleprompter*) the Aereo service does not infringe upon the broadcast copyright holder's exclusive rights.

> The same two features [present in *Cablevision*] are present in Aereo's system. When an Aereo customer elects to watch or record a program using either the "Watch" or "Record" features, Aereo's system creates a unique copy of that program on a portion of a hard drive assigned only to that Aereo user. And when an Aereo user chooses to watch the recorded program, whether (nearly) live or days after the program has aired, the transmission sent by Aereo and received by that user is generated from that unique copy. No other Aereo user can ever receive a transmission from that copy. Thus, just as in *Cablevision*, the potential audience of each Aereo transmission is the single user who requested that a program be recorded.

712 F.3d at 690.[8]

The Other Side of the Lens: Fox vs. FilmOn X[9]

In *Fox vs. FilmOn X* the District Court for the District of Columbia articulated an alternate, and arguably diametrically opposed copyright allocation analysis of remote DVR use of copyrighted television broadcasts. In *Fox*, the remote DVR service at issue was functionally equivalent to that involved in *Aereo*.

> Defendants operate FilmOn X, a service that uses the Internet to give consumers the ability to watch live over-the-air television channels through their computers and on their mobile devices. FilmOn X also has a digital video recorder, or DVR, capability, permitting users to pause live programming or record shows for later viewing. FilmOn X assigns an individual user the content stream from one of thousands of minute antennas that it operates in major metropolitan areas….Plaintiffs complain that FilmOn X is violating their exclusive right to public performance of their copyrighted works, which include local programs and

[8] Indeed, the court expressly noted that plaintiff's arguments were essentially a plea that *Cablevision* be overturned. "Though presented as efforts to distinguish *Cablevision*, many of Plaintiffs' arguments really urge us to overrule *Cablevision*. One panel of this Court, however, 'cannot overrule a prior decision of another panel.'" 712 F.3d at 690-95.

[9] *Fox TV Stations, Inc. v. FilmOn X LLC*, 108 U.S.P.Q.2D (BNA) 1593; (D.D.C 2013)

> some of the country's most popular evening television shows…. FilmOn X responds that it modeled its process after the system approved in…*Cablevision*….FilmOn X contends that *Cablevision* held, as a matter of law, that there is no public performance of a copyrighted work if there is a one-to-one relationship between a copy of the copyrighted work and the recipient—*i.e.,* so long as each FilmOn X user has his or her own assigned antenna, there is no copyright violation."

108 U.S.P.Q.2D at 1594-95. Unlike the *Aereo* court, however, the District of Columbia District Court did not embrace the *Cablevision* analysis of the issue:

> The Court finds that the provisions of the 1976 Act that protect Plaintiffs' work are clear: FilmOn X's service violates Plaintiffs' "exclusive right . . . to perform the copyrighted work publicly."….By making available Plaintiffs' copyrighted performances to any member of the public who accesses the FilmOn X service, FilmOn X performs the copyrighted work publicly as defined by the Transmit Clause… FilmOn X contends that it does not perform publicly because FilmOn X facilitates a one-to one relationship between a single mini-antenna and a viewer of Plaintiffs' programs via an admittedly complex technological process. First, this is a charitable description of FilmOn X's arrangement; while each user may have an assigned antenna and hard-drive directory temporarily, the mini-antennas are networked together so that a single tuner server and router, video encoder, and distribution endpoint can communicate with them all. The television signal is captured by FilmOn X and passes through FilmOn X's single electronic transmission process of aggregating servers and electronic equipment. This system, through which any member of the public who clicks on the link for the video feed, is hardly akin to an individual user stringing up a television antenna on the roof.

108 U.S.P.Q.2D at 1605-06; *accord, Fox Television Systems, Inc. v. Barry-Driller Content Systems, PLC,* 915 F. Supp. 2d 1138 (C.D. Cal. 2012). In sum, in addition to setting forth a differing statutory analysis of the public performance right, i.e., that a transmission to even a single commercial customer can constitute a transmission to the public, *see* 108 U.S.P.Q.2D at 1603-06, the *Fox* court simply refused to equate defendant's provision and maintenance of remote DVR service to third parties with an activity that a private individual could undertake in her own home. *Cf. Cablevision*, 536 F.3d at 131 and *supra*, at p. 7.

The Supreme Court's Decision

The plaintiffs in *Aereo* appealed to the United States Supreme Court. In its analysis, the Court renounced the *Fortnightly/Teleprompter* "viewer vs. performer" paradigm, finding that *both Aereo and its customers engage in the performance of television broadcasts*:

> History makes plain that one of Congress' primary purposes in amending the Copyright Act in 1976 was to overturn this Court's determination that community antenna television (CATV) systems (the precursors of modern cable systems) fell outside the Act's scope….Congress enacted new language that erased the Court's

> line between broadcaster and viewer, in respect to "perform[ing]" a work….Under this new language, *both* the broadcaster *and* the viewer of a television program "perform," because they both show the program's images and make audible the program's sounds….Congress also enacted the Transmit Clause, which specifies that an entity performs publicly when it "transmit[s] . . . a performance . . . to the public."….Cable system activities, like those of the CATV systems in *Fortnightly* and *Teleprompter*, lie at the heart of the activities that Congress intended this language to cover….Congress further created a new section of the Act to regulate cable companies' public performances of copyrighted works. See §111….Congress made these three changes to achieve a similar end: to bring the activities of cable systems within the scope of the Copyright Act.[10]

Accordingly, the dispositive question became whether Aereo performs publicly. The Court held that it does:

> We do not see how the fact that Aereo transmits via personal copies of programs could make a difference….[R]etransmitting a television program using user-specific copies is a "process" of transmitting a performance….So whether Aereo transmits from the same or separate copies, it performs the same work; it shows the same images and makes audible the same sounds. Therefore, when Aereo streams the same television program to multiple subscribers, it "transmit[s] . . . a performance' to all of them. Moreover, the subscribers to whom Aereo transmits television programs constitute 'the public.' Aereo communicates the same contemporaneously perceptible images and sounds to a large number of people who are unrelated and unknown to each other. This matters because, although the Act does not define 'the public,' it specifies that an entity performs publicly when it performs at 'any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.'[11]

Assessing the Impact of the *Aereo* Decison

The copyright allocation of remote DVR use of television broadcasts involved more than a mere difference of opinion among the courts that addressed the issue. Both of the prevailing interpretations of the pertinent statutory language are viable, but the question presented is at bottom one of a policy decision regarding the copyright social utility of this new technological use for television broadcasts. As the Supreme Court ultimately ruled, contextually, the challenge is assessing whether the use is more like those that Congress has decided that authors should control, or those as to which Congress has decided that allocation to the public better serves the interests of copyright social utility. "[T]he many similarities between Aereo and cable companies, considered in light of Congress' basic purposes in amending the Copyright Act, convince us that… Aereo is not just an equipment supplier and that Aereo "perform[s]."'"[12]

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[10] *ABC, Inc. vs Aereo, Inc*., 134 S. Ct. 2498, 2504, 2505-06 (2014)

[11] Id. at 2509.

[12] Id. at 2507. *See* Lateef Mtima, *Tasini and Its Progeny: The New Exclusive Right or Fair Use on the Electronic Publishing Frontier?*, 14 Fordham Intell. Prop. Media & Ent. L.J. 369, 404-05 (2004) "The identification of any of exclusive rights simulated by or incorporated within a new use for copyrighted material is a reasonable method by which to determine the appropriate author/exclusive rights versus public/free access classification for that new use.

Moreover, in addition to renouncing the "viewer vs. performer" paradigm, the Supreme Court's decision also clarified the *Fortnightly* proposition that a commercial entity can undertake any uses of copyrighted material that are available to private individuals (i.e., erecting a TV antenna on a hill, etc.) While it is certainly true that once a copyright use is designated as freely available to the public, commercial users are included (as members of the public), on the other hand, where the use has been allocated as exclusive to authors, private individuals may enjoy Fair Use "easements" that may not be available to commercial actors. What was not at issue or explored in *Fortnightly* is what *specific* legal right would permit a private individual to use an antenna to capture and view a copyrighted television broadcast, i.e., a characterization that the activity is not an exclusive right, or rather, an assessment that although the activity does implicate one or more exclusive rights, it should be permitted as a Fair Use? Depending upon the legal basis for permitting unauthorized private individual engagement in the activity, the *Fortnightly* proposition may not apply to any and all "commercial surrogate" copyright use conduct.

Further, just as a commercial actor cannot always be deemed the "copyright equivalent" of a private individual, not all commercial copyright actors are "copyright equivalent" to each other. In the haste to analogize DVR use to VCR use, some courts overlook the differences between the purchase and use of VCR or DVR *equipment*, and subscription to a remote (or similar) DVR *service.* Put differently, whereas the remote DVR service customer may be functionally indistinguishable from the VCR user, it does not necessarily follow that the remote DVR service purveyor is indistinguishable from the VCR manufacturer or seller. Obviously remote DVR service providers play a broader and more active role in the collective transmission, reproduction, and playback process experienced/undertaken by its customers, and whether its additional involvement should be analyzed under direct infringement or contributory infringement principles (or both), assessing these activities *solely* from the perspective of the impact on customer/user needlessly truncates the copyright analysis.

In this regard, the Supreme Court decision seems to stops short of overruling *Cablevision* (or addressing other digital services such as cloud computing) and instead suggests that the lower court in *Aereo* may have simply applied *Cablevision* too rigidly; solely asking whether the service provides for "individual access to individual copies" may be oversimplifying the inquiry, depending upon the specific technology or configuration at issue.[13] "In other cases involving

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It is not, however, the only reasonable method. Another legitimate approach to the new-use classification problem is to consider the new use as sui generis - that is, as an activity unique and distinguishable from any existing uses, including any exclusive rights that may be simulated by or incorporated within the new use. In deciding which uses of copyrighted material should be relegated to the copyright holder as exclusive rights, Congress has the opportunity to consider a variety of factors, including the nature of each particular use and the effect that removing the use from the public enjoyment is likely to have on the underlying objectives of copyright law. The fact that a new use simulates or incorporates an existing exclusive right, however, does not obviate the need to engage in the same analysis with respect to the new use. Although a new use may simulate or incorporate one or more existing exclusive rights, that new use may also exhibit other characteristics and may also implicate policy issues independent of those presented by any of the exclusive rights it might incorporate or resemble. The presence of these additional characteristics and policy issues may compel an entirely different conclusion in the exclusive rights versus public free access assessment. Accordingly, approaching the new use of digital re-publication as merely a simulation or combination of the exclusive rights of reproduction, distribution, and/or public display is somewhat akin to regarding a cake as merely a serving of eggs, milk, and flour."

[13]For example, characterizing each DVR reproduction as a "unique copy" may be just as meaningful as characterizing the image of an object on the human retina as a unique copy, despite the fact that it is possible to shift one's gaze away from and back toward the object, arguably creating a new and "unique copy" with each glance.

different kinds of service or technology providers, a user's involvement in the operation of the provider's equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act."[14]

Conclusion

The advent of new technological uses for copyrighted material typically raises questions as to how these developments might affect the copyright social utility status quo. While some advances can be readily incorporated into the existing copyright regime, others require a policy-focused assessment of the potential impact upon the social utility objectives which underlie copyright protection.[15] The Supreme Court's analysis in *Aereo* illustrates that while courts can wrestle with digital information uses for copyrighted material, given the paradigm changing impact of digital information technology, and the rapid pace at which these technologies evolve, judicial assessment of individual advances and applications can be an inefficient, unpredictable, and incomplete approach to delineating and settling the law in this field.[16] The copyright issues presented by DVR (and many other digital information) technologies will likely continue to challenge judicial capability to parse and interpret the pertinent provisions of the Copyright Act. Now that the Supreme Court has pronounced upon the issues, perhaps its intervention will have the same affect upon Congress as its decisions in *Fortnightly* and *Teleprompter*, and prompt Congress address these and other copyright challenges of the digital information age.

[14] 134 S. Ct. at 2507. Indeed in Cablevision, the users were recording broadcasts to which they already had rightful access, a distinguishing fact from those in *Aereo*. "Neither the record nor Aereo suggests that Aereo'ssubscribers receive performances in their capacities as owners or possessors of the underlying works. This is relevant because when an entity performs to a set of people, whether they constitute 'the public' often depends upon their relationship to the underlying work." Id. at 2510.

[15] "When the traditional copyright analogues do not satisfactorily apply, it is appropriate for Congress to act. Congress is best equipped to determine the appropriate manner in which to interpret, apply, and if necessary, amend the copyright law in order to address a sui generis challenge to the constitutional copyright objective and the established copyright framework. It is the responsibility of Congress to assess whether the overarching goals of the copyright law are best served by designating a new use as an exclusive right, a use as to which the public should be given free reign, or a use that warrants the application of a customized response, such as a compulsory license." Mtima, *supra*, 14 Fordham Intell. Prop. Media & Ent. L.J. at 413-14.

[16] Indeed, the *Aereo* dispute did not afford the Court the opportunity to resolve all of the imminent questions presented by remote DVR service. *See e.g. Fox Broad. Co. v. Dish Network, L.L.C.*, 723 F.3d 1067, 1073-74 (9th Cir. 2013) (analyzing "Hopper" TV-commercial skipping technology, and holding that although the defendant satellite service provider "exercises a degree of discretion" in the subject copying and playback process, the fact that the process is undertaken by customers using non-remote equipment in their homes negates plaintiff's claims for direct infringement, and plaintiff's claims for contributory infringement are unsustainable where customers' conduct is permissible under Fair Use); *accord*, *DISH Network, L.L.C. v. ABC, Inc. (In re AutoHop Litig.)*, 2013 U.S. Dist. LEXIS 143492.